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No. 1410

IN THE

Supreme Court of the United States

October Term, 1970

CERTAIN SPACE IN THE PROPERTY KNOWN AS THE CHIMES BUILDING, 109 WEST ONONDAGA STREET, SYRACUSE, ONONDAGA COUNTY, STATE OF NEW YORK, ET AL.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second District

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BRIEF FOR RESPONDENT CITY INVESTING COMPANY IN OPPOSITION

WILLIAM L. ALLEN, JR.
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SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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I.

Opinions Below

The opinion of the United States District Court for the Northern District of New York, (Port. U.S.D.J.) is now reported at 320 F. Supp. 491.

The decision of the United States Court of Appeals for the Second Circuit is now reported at 435 F. 2d 872.

II.

Questions Presented

1. Did the Courts below err in concluding that the Anti-Assignment Act, 31 U.S.C. 203, was for the Government's benefit and protection, and that Petitioners' assignment of all their rights to "any sum of money" from the condemnation was a valid basis for payment to the assignee, where the Government had not asserted the Act but had recognized the assignment?

2. Was summary judgment proper on the Record that showed an explicit written assignment of "all . . . of our interest in and to any sum", and the petitioners' later attack on that assignment was based on prior writings never shown by a party to the assignment to be a part of the final express assignment transaction?

III.

Statement of Case

By a complaint in condemnation, filed December 29, 1966, the United States condemned a portion of the Chimes

Building in Syracuse, */ for a period of six months commencing January 1, 1967 with a right to renew. Previously the Government had leased a greater portion of the Chimes Building under a 20-year lease, expiring December 31, 1966.

Some few months after the taking, City Investing as holder of the second mortgage on the premises commenced foreclosure proceeding for defaults by Petitioner. After negotiations extending to October, 1967, a formal assignment was made by petitioners of "all" of our "right, title and interest in and to any sum of money found to be due from the United States . . . resulting from the condemnation by the United States", and City Investing because owner of the premises by a deed from petitioners recorded October 17, 1967.

The foreclosure action was subsequently dismissed. **/

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*/ The authority for the taking was

> "the act of August 1, 1888 (25 Stat. 357, c728), as amended, the Act of February 26, 1931 (46 Stat. 1421, c307), as amended, the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, (63 Stat. 377), as amended; and Independent Offices Appropriation Act, 1967, approved September 6, 1966 (80 Stat. 663)." (Petitioners' "Appellants Appendix" to Court of Appeals, p. 1)

and the jurisdiction of the District Court was conferred by Title 28, Section 1358, United States Code.

**/ Petitioners assert that their execution of the deed and assignment was "forced . . . to avoid personal liability" (Petition, p. 7). No such claim was made in the District Court. Moreover, such is not the case, since the terms of the mortgage provided: "The mortgagor herein shall not be required personally to assume the indebtedness secured by this consolidated mortgage and the mortgagee herein, its successors and assigns agree to look solely to the real property covered by this consolidated mortgage and in the event of any default hereunder, the mortgagee, its successors and

(Continued)

The assignment contained the further language:

"we empower said CITY INVESTING COMPANY in its own name or in our names to do and perform all acts, matters and things touching the premises . . . and, if necessary, to bring appropriate proceedings in said condemnation for the substitution of itself in our place as defendant in said action for the purpose of recovering to its own use all sums to be found to be due and owing from the United States of America by reason of such condemnation.

We covenant that we will not at any time hereafter take any steps whereby the monies found to be due and owing from the United States of America as a result of any adjudication, award or settlement of Civil Action #66CV 483 or any part thereof shall be paid to us except for the purpose of transmitting the same by endorsement or otherwise to CITY INVESTING COMPANY nor will we do any act whereby CITY INVESTING COMPANY, its successors or assigns, may be prevented or hindered from enforcing payment of the same; we further covenant that we and all persons claiming under us, including our heirs, executors and assigns, shall and will from time to time, or at any time hereafter, execute such further assurances for effectually assigning the said monies found to be due and owing from the United States of America to CITY INVESTING

(Footnote continued)

assigns agree not to sue the mortgagor or bring any action for a personal moneyed judgment against the mortgagor." Onondaga County Clerk's Office, Book of Mortgages, 1530 at p. 41.

The note had similar language. The foreclosure action did not seek any deficiency judgment. Onondaga County Clerk's Office, Civil Action, Index No. 67-1780.

COMPANY, its successors or assigns, as it or they or it or their counsel in law shall require." */

However, upon City Investing's application for payment of the remainder of the amount stipulated between City Investing and the Government to be just compensation for the January 1, 1967 taking, Petitioners opposed through their attorneys affidavit, urging:

"ADOLPH H. HUTTAR, being duly sworn, deposes and says:

1. I am the attorney for Walter J. Sampson, Bernard Greenbaum, Abner J. Mesirow and Arthur A. Bogeaus, d/b/a Southeastern Industrial District (hereinafter referred to as "SEID"), a party interested in the captioned proceeding and am the successor counsel to the firm of Mackenzie, Smith, Lewis, Michel, and Hughes, former attorneys for SEID.

2. On or about the 21st of October, 1968, SEID was served with a motion by City Investing Company for an order pursuant to Rule 71A of the Federal Rules of Civil Procedure to (1) fix the total compensation to be paid by the United States for the taking of the rights and interests in the Chimes Building, (2) for a determination that City Investing Company be declared the sole interested party in this action, and (3) for a discontinuance of the captioned action on the merits. This affidavit is submitted in opposition to the aforesaid motion.

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*/ The petition is misleading in setting forth only the names of three of the petitioners on the assignment. In fact all four executed the assignment. (Petitioners "Appellant's Appendix" pp. 26-27. Cf. District Ct. opinion, Petition p. 17-18.

3. That unless otherwise stated, the statements made herein are made on information and belief.

4. From 1947 until December 31, 1966, the United States Government was the lessee of over 95% of the Chimes Building in Syracuse, New York. The government's condemnation took place on January 1, 1967, and the government remained in possession until November 30th of that year. SEID was the fee owner of the Chimes Building from February 29, 1952, until August 15, 1967, at which time SEID delivered a deed of the fee to City Investing, the moving party, which also held a second mortgage on the Chimes Building.

5. The assignment relied on in the present motion is void and of no force and effect, having not come into inception or being by virtue of the provisions of law. Title 31 U.S.C.A. § 203 reads in pertinent part as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

This fact was construed by the United States Supreme Court in U.S. v. Dow, 78 S. Ct. 1039 (1958) to be binding and mandatory. The facts in the Dow case are strikingly similar to the facts in the present case.

A copy of that opinion has been attached hereto for the convenience of the Court.

6. In addition, the proposed settlement purports to include all claims for restoration against the United States. However, SEID has restoration claims arising out of the government's lease of the Chimes Building up to December 31, 1966, which cannot be the subject of the settlement of the condemnation procedure. Any restoration claims under the instant suit arise out of the government's occupancy during the condemnation period only.

7. It is respectfully submitted that the only interested party in these proceedings, and the only party who can be interested as a matter of law is SEID, the owner in possession on the date of filing of the notice of taking.

8. The defendant SEID also asserts in the alternative that by virtue of the arrangement evidenced by the attached letter agreement, SEID has a residual interest in these proceedings.

9. That SEID disapproves of the proposed settlement.

WHEREFORE, your deponent respectfully requests that this motion be denied and that an order be entered directing that SEID is the only party entitled to have an interest in this proceeding.

ADOLPH H. HUTTAR

Adolph H. Huttar

(Sworn to December 16, 1968)."

(Petitioners' "Appellant's Appendix" to the U.S. Court of Appeals, Second Circuit, p. 37-39.)

The District Court treated the application for payment as a motion for summary judgment, and granted the relief requested. The United States Court of Appeals for the Second Circuit affirmed.

Argument

Essentially Petitioners are quarrelling with two points applied in the lower courts: (1) The validity between the parties of an assignment of all interest in a condemnation award, in a case where the Government has not asserted any objection under the Anti-Assignment Statute; and (2) The conclusion that Petitioners did not adequately negate the absolute terms of the assignment of "all interest in any sum" so as to create a triable issue of fact.

On neither of these points does a review of this case show a conflict with the decisions of this Court, nor, on the question of summary judgment, any conflict with the applicable standards of federal law, or of the law of New York.

I.

There is no conflict with cases construing the Anti-Assignment Statute.

The Anti-Assignment Act, 31 U.S.C. Section 203, despite its broad terminology is not construed to absolutely nullify "all transfers and assignments". Assignments of claims are recognized as effective between the parties thereto.

Segal v. Rochelle, 382 U.S. 375, 384 (1966).

The Act is construed and applied in accordance with its purpose of protecting the Government.

Segal v. Rochelle, 382 U.S. 375 (1966) at 384, citing Martin v. National Surety Co., 300 U.S. 588 (1937).

And, it has long been established that the protection of the statute can be waived by the Government.

Freedman's Saving & Trust Co. v. Shepherd, 127 U.S. 494 (1388) at 505-506.

Petitioners urge a conflict with the holding of this Court in United States v. Dow, 357 U.S. 17 (1958). But there, the government did object to the assignment and asserted the prohibition of the Anti-Assignment Act. Such is not the case here, and this case is plainly distinguishable. Thus, there is no conflict with the Dow case.

Petitioners also assert conflict between this case and National Bank of Commerce v. Downie, 218 U.S. 345 (1910) and Manhattan Commercial Co. v. Paul, 216 N.Y. 481 (1916) -- two cases holding assignments absolutely void. But the construction of the Act in the Downie case, relied on in the Paul case, was disavowed by this Court in Martin v. National Surety Co., 300 U.S. 588 (1937), see esp. 596-597. This was recognized in more recent cases, see Segal v. Rochelle, 382 U.S. 375 (1966); Matter of Ideal Merchantile Corporation, 244 F. 2d 828 (2d Cir. 1957) at 832; Bingham & Co. v. Bie, 133 N.Y.S. 2d 453 (Sup. Ct. N.Y. Co. 1954).

The language of this Court in Freedman's Saving & Trust Co. v. Shepherd, 127 U.S. 494 at 506 that:

> "Here, the officers of the government chose to recognize the assignment . . . "

fits equally here, and so does the conclusion there that:

> "of their action neither [of the private parties] . . . can rightfully complaint. (Matter in brackets added).

See also Leonard v. Whaley, 91 Hun. 304 at 307, 36 N.Y. Supp. 147, at 148 (2d Dep't 1895) cited with approval in Segal v. Rochelle, 382 U.S. at 384.

This case then contains no holding contrary to the past decisions of this Court on the Anti-Assignment Act.

Neither the Federal Rules nor State Law was violated by the grant of Summary Judgment here.

The assignment instrument was clear and unambiguous as to the transfer to City Investing of all rights and interests in this condemnation, leaving no interest to support Petitioners' present claim.

Cf. Maloney v. John Hancock Mutual Life Ins. Co., 271 F. 2d 609 (2d Cir. 1959);

Northwest Oil & Refining Co. v. Honolulu Oil Corp., 195 F. Supp. 281, 286, 287 (D. C. D. Mont. 1961).

Petitioners have cited Exchange Leasing Corp. v. Bundy, 29 A. D. 2d 828 (4th Dep't 1968) to escape the force of its unambiguous assignment, and the parol evidence rule. As noted by the court in that case raising the defense of usury, the parol evidence rule "would not apply in any event, because it appears that . . . the separate written document [option to repurchase] . . . was definitely a part of the entire agreement." The Record on Appeal in that case shows plainly that Bundy by his own affidavit as well as by deposition of plaintiff showed facts proving that the lease, the basic document relied on, was not an entire integration to which the parol evidence rule would apply.

Here, that kind of showing is lacking, supra p. 4 to 6.

To successfully oppose summary judgment, even where resort to parol evidence would be allowed at trial, a real showing of opposer's version of the facts -- in evidentary form -- is required. Ehrlich v. Amer. Moninger Greenhouse, 26 N. Y. 2d 255 (1970) at 259.

Petitioners' affidavit in opposition, is plainly insufficient to meet the standards of F. R. Civ. P. 56(e), since

it is made only "on information and belief", not personal knowledge (supra p. 5). */

Automatic Radio Mfg. Co. v. Hazeltime Research Inc., 339 U.S. 827 (1950) at 831;

6 Moore, Federal Practice (2d ed.) par. 56.22[1] at pages 2803-2806.

See also N.Y. Civil Practice Law and Rules, Section 3212 requiring personal knowledge of affiant.

The case cited by Petitioners' -- Sartor v. Arkansas National Gas Corp. 321 U.S. 620 (1944) dealt principally with the insufficiency of affidavits of experts, setting forth their opinion of value, to justify summary judgment where such value was the disputed issue. Sartor is not analogous to this case.

In the circumstances shown by the papers in this case, there is no issue of importance regarding summary judgment procedure to be reviewed by this Court.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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*/ And without even stating any basis for the information and belief.